

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

OSCAR GOLDEN,

Defendant-Appellant.

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UNPUBLISHED

January 31, 2006

No. 257403

Wayne Circuit Court

LC No. 04-003697-01

Before: Sawyer, P.J., and Wilder and H. Hood\*, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial conviction for voluntary manslaughter, MCL 750.321. Defendant was sentenced, as a fourth habitual offender, MCL 769.12, to fifteen to thirty years' imprisonment. We affirm.

Defendant's first issue on appeal is that his request for substitute counsel was improperly denied. A trial court's decision regarding substitution of counsel will not be disturbed absent an abuse of discretion. *Mack, supra* at 14. An abuse of discretion exists when an unprejudiced person, considering the facts on which the trial court acted, would conclude that there was no justification for the ruling made. *People v Murray*, 234 Mich App 46, 52; 593 NW2d 690 (1999).

An indigent defendant is guaranteed the right to counsel; however, he is not entitled to have the attorney of his choice appointed simply by requesting that the attorney originally appointed be replaced. *Mack, supra* at 14. "Appointment of a substitute counsel is warranted only upon a showing of good cause and where substitution will not unreasonably disrupt the judicial process." *Id.*

This case is slightly irregular in that the trial court never apparently ruled on defendant's request for substitution of counsel. After defense counsel relayed defendant's request for a new lawyer, the trial court agreed to send defendant before the Chief Judge and to abide by the Chief Judge's decision. There is no record of any proceedings before the Chief Judge. In the trial transcript, the start of the trial, with the same defense counsel representing defendant, immediately follows the trial court's statement that defendant could go before the Chief Judge right away. Nothing before us reflects what, if anything, happened before the Chief Judge.

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\* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

Based on what is in the record, the denial of defendant's request for substitute counsel is not an abuse of discretion. The first showing defendant would have had to make is one of good cause for substitution. "Good cause exists where a legitimate difference of opinion develops between a defendant and his appointed counsel with regard to a fundamental trial tactic." *Mack, supra* at 14. Disagreements fairly characterized as matters of professional judgment or trial strategy do not justify substitution of counsel. "A complete breakdown of the attorney-client relationship or disagreement over whether a particular line of defense should be pursued may justify appointing new counsel." *People v O'Brien*, 89 Mich App 704, 708; 282 NW2d 190 (1979). A defendant may not, however, purposely break down the attorney-client relationship by refusing to cooperate with his assigned attorney and then argue that there is good cause for a substitution of counsel. *People v Traylor*, 245 Mich App 460, 462; 628 NW2d 120 (2001).

We do not find good cause for a substitution of counsel in this case for two reasons. First, defendant claims that there was a complete breakdown in communication between him and his lawyer, but that breakdown appears to have been caused by defendant's refusal to cooperate with his assigned attorney. Defense counsel specifically stated on the record that she has tried to communicate with defendant and the trial court noted that defendant was the one refusing to cooperate. Second, the breakdown in communication appears to be over trial strategy and not fundamental trial tactics. On appeal, defendant argues that his trial counsel was ineffective, in part, because she refused to call certain witnesses and inform the jury of certain facts in an effort to show that defendant acted in self-defense. While a disagreement over whether to argue self-defense would be one over a fundamental trial tactic, trial counsel did in fact argue that defendant acted in self-defense. She just did not do it exactly how defendant might have wished.

Defendant would have also needed to show that the substitution of counsel would not "unreasonably disrupt the judicial process." *Traylor, supra* at 462. The record is silent on why he chose to wait, but defendant did not request a new lawyer until the day the trial was set to start. Waiting until the trial is just about to start has been found to unreasonably disrupt the judicial process because it would require adjournment of the trial to enable the substitute counsel to familiarize himself with the case. *People v Johnson*, 144 Mich App 125, 135; 373 NW2d 263 (1985). If the breakdown between defendant and his trial counsel was as complete as he claims, then he could have requested a new lawyer much sooner than the day the trial started and not when that substitution would unreasonably disrupt the judicial process. We therefore conclude that there is no abuse of discretion with regard to the denial of defendant's request for substitution of counsel because the breakdown in communication was caused by defendant, it was not a disagreement over a fundamental trial tactic, and the substitution would unreasonably disrupt the judicial process.

Defendant's second issue on appeal is whether the trial court erred in failing to obtain an on-the-record waiver of defendant's right to testify. In *People v Simmons*, 140 Mich App 681, 683-684; 364 NW2d 783 (1985), this Court determined that an on-the-record waiver of a defendant's right to testify was not required. In reaching that conclusion, the *Simmons* Court reasoned that "a formal waiver requirement might 'provoke substantial judicial participation that could frustrate a thoughtfully considered decision by the defendant and counsel who are designing trial strategy.'" *Simmons, supra* at 684, quoting *State v Albright*, 96 Wis 2d 122; 291 NW2d 487 (1980). This Court's holding in *Simmons* has been followed with approval in *People v Harris*, 190 Mich App 652, 661-662; 476 NW2d 767 (1991). Defendant acknowledges that

there is no requirement that a defendant's waiver of the right to testify appear on the record, but he urges that this Court reject the reasoning of prior cases and adopt such a requirement. We decline to do so.

Defendant's third issue on appeal is that he was denied effective assistance of counsel. Defendant did not move for a new trial or an evidentiary hearing on this basis below. Failure to so move forecloses appellate review unless the record contains sufficient detail to support his claims, and, if so, review is limited to the record. *People v Barclay*, 208 Mich App 670, 672; 528 NW2d 842 (1995). Whether a person has been denied the effective assistance of counsel is a mixed question of fact and constitutional law. The trial court's factual findings are reviewed for clear error, while its constitutional determinations are reviewed de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

To prevail on a claim for ineffective assistance of counsel, a defendant must make two showings. First, the defendant must show that counsel's performance was deficient and that, under an objective standard of reasonableness, the defendant was denied his Sixth Amendment right to counsel. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001). Effective assistance of counsel is presumed and the defendant bears a heavy burden of proving otherwise. *LeBlanc*, *supra* at 578. Second, the defendant must show that the deficient performance prejudiced the defense. To demonstrate prejudice, the defendant must show the existence of a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *Carbin*, *supra* at 599-600. Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight. *People v Garza*, 246 Mich App 251, 255; 631 NW2d 764 (2001).

First, defendant argues that trial counsel was ineffective for denying defendant the right to testify. A defendant has a constitutional right to testify at his own trial. *People v Boyd*, 470 Mich 363, 386; 682 NW2d 459 (2004). Moreover, trial counsel cannot stop a defendant from testifying. *Simmons*, *supra* at 685. However, trial counsel may advise a defendant not to testify and that advice is presumed to be sound trial strategy. *People v Tommolino*, 187 Mich App 14, 17; 466 NW2d 315 (1991).

In this case, there was some confusion about whether defendant was going to testify. At first, defendant said he would. Then, after defendant and trial counsel conferred, trial counsel indicated that defendant would not testify. Later, they conferred again, and trial counsel asked defendant to state whether he would testify free of any interference from her. Defendant stated that he would testify. After a short recess, however, trial counsel again indicated that defendant would not testify and the defense rested. There was no ineffective assistance of counsel in that discussion. Trial counsel stated that she had some place to go, but she also stated that defendant must not factor that into his decision and should make the decision on his own. Defendant did state on the record that he wished to testify, but he also seemed to have changed his mind twice after conferring with trial counsel. Whatever she advised, the record does not support the view that trial counsel denied defendant the right to testify, and we must conclude that there was no ineffective assistance of counsel on that ground.

Second, defendant argues that trial counsel was ineffective for failing to call witnesses. Decisions regarding whether to call witnesses are presumed to be matters of trial strategy. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). Furthermore, the failure to call witnesses only constitutes ineffective assistance if it deprives defendant of a substantial defense. *Dixon*, *supra* at 398. A substantial defense is defined as one that might have made a difference in the outcome of the trial. *People v Ayres*, 239 Mich App 8, 22; 608 NW2d 132 (1999). In this case, defendant alleges that trial counsel should have called two witnesses who would testify about the victim's violent nature. Trial counsel did, however, question witnesses at trial about a fight the victim had engaged in before this incident and defendant was therefore not deprived of the defense. Whether that defense could have been successful by calling the witnesses and why trial counsel chose not to call the witnesses is unclear from the record. By failing to move for a new trial or a *Ginther* hearing, defendant denied trial counsel the opportunity to explain why she did not call any witnesses. Defendant has the burden of establishing the factual predicate for his claim, *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999), and based on this record, we must conclude that defendant cannot overcome the presumption that counsel was effective.

Third, defendant argues that trial counsel was ineffective for failing to file a motion to suppress his statement to the police. In determining whether defendant's statement was knowing, voluntary, and intelligent, this Court applies an objective standard and examines the totality of the circumstances. *People v Fike*, 228 Mich App 178, 181; 577 NW2d 903 (1998). No single factor is determinative, and in order to establish a valid waiver of the right to remain silent, the prosecution need only prove that defendant was aware of his available options. *Fike*, *supra* at 182.

In this case, the record does not support defendant's contention that his statement was involuntary or that he did not intelligently and knowingly waive his rights. Although defendant may have taken some medication hours before being interrogated, there is no evidence that he did not understand his right to remain silent, his right to obtain an attorney, or the fact that his statements may be used against him at trial. Accordingly, we conclude that his statement was properly admitted at trial, and trial counsel cannot be faulted for failing to raise an objection or motion that would have been futile. *Fike*, *supra* at 182. Moreover, trial counsel's actions might well have been a matter of trial strategy. Defendant claimed in his statement that he stabbed the victim in self-defense, which fits with trial counsel's self-defense arguments at trial. In matters of trial strategy, this Court will not substitute its judgment for that of counsel. *Fike*, *supra* at 183. Therefore, either because it would have been futile or because it fit with counsel's trial strategy, we conclude that trial counsel was not ineffective for failing to file a motion to suppress defendant's statement to the police.

Fourth, defendant argues that trial counsel was ineffective for failing to impeach at the preliminary examination the police officer that took down defendant's statement. At one point in the preliminary examination, the police officer quoted defendant's statement as saying "That's when I grabbed the knife and stabbed him." The actual quote, however, was "That's when I grabbed the knife and stabbed at him." Defendant argues on appeal that trial counsel's failure to impeach that statement allowed the court to find probable cause to bind defendant over for trial for second-degree murder.

Even if trial counsel was ineffective in failing to impeach the police officer at the preliminary examination, which is doubtful considering that decisions regarding whether to

question witnesses are presumed to be matters of trial strategy, defendant is completely incapable of showing that the error prejudiced him. There was ample evidence presented at the preliminary examination to support a finding of probable cause. Defendant's statement itself mentions several times that he stabbed the victim. Moreover, if impeached, the police officer could have simply corrected himself and there would still have been probable cause. Based on the abundant evidence presented at the preliminary examination, we conclude that defendant cannot show a prejudicial error on the part of trial counsel in failing to impeach one witness at the preliminary examination.

Fifth, defendant argues that trial counsel was ineffective for failing to present exculpatory evidence of defendant's debilitating injuries. Decisions regarding what evidence to present are presumed to be matters of trial strategy that this Court will not second-guess. *Dixon, supra* at 398. Because defendant failed to move for a new trial or an evidentiary hearing below, review is limited to the record. *Barclay, supra* at 672. Nothing in the record, however, suggests that the presumption of sound trial strategy should be overcome. Trial counsel presented a self-defense argument that may or may not have been aided by evidence that defendant had health problems before the incident. She choose not to present the evidence, her choice is presumed to be sound trial strategy, and nothing in the record shows that it was not. We, therefore, conclude that trial counsel was not ineffective for failing to present evidence of defendant's health before the incident.

Sixth, defendant argues that trial counsel was ineffective for failing to exercise sound trial strategy. This Court is reluctant, however, to substitute its judgment for that of trial counsel in matters of trial strategy, and ineffective assistance of counsel will not be found merely because a strategy backfires. *Ayres, supra* at 22. In this case, trial counsel presented a self-defense argument. That argument did not work, but nothing in the record suggests that it was unsound. Therefore, we conclude that trial counsel was not ineffective for failing to exercise sound trial strategy.

Defendant's final issue on appeal is that the cumulative effect of the errors in his case requires that defendant be granted a new trial. Absent the establishment of errors, there can be no cumulative effect of errors meriting reversal. *People v Mayhew*, 236 Mich App 112, 128; 600 NW2d 370 (1999). Prejudicial error has not been identified in this case. As discussed above, the errors defendant alleged occurred are not errors at all. Therefore, we conclude that defendant was not denied a fair trial based on the cumulative effect of errors in his case.

Affirmed.

/s/ David H. Sawyer  
/s/ Kurtis T. Wilder  
/s/ Harold Hood